FILE COPY

Office Supreme Court
FILED
DEC 7 19
CHARLES ELMORE

No. 166

In the Supreme Court of the United States

OCTOBER TERM, 1932

JOHNSON & HIGGINS OF CALIFORNIA, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	1
Statement	2
Discussion	4
Conclusion	8

CITATIONS

Cases:

Ralli v. *Troop*, 157 U. S. 386 7

Statutes:

Act of June 4, 1920, c. 227, Subch. I, sec. 9, 41 Stat. 759, 766 (U. S. C., Title 10, sec. 72) 6

Army Appropriation Act of June 30, 1922, c. 253, 42 Stat. 716, 730 6

Miscellaneous:

Special Regulations No. 71, Army Transport Service, 1918, Secs. I and II 6

145840—32

In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 166

JOHNSON & HIGGINS OF CALIFORNIA, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 15–22) is not officially reported. It was published in 1932 A. M. C. 680.

JURISDICTION

The judgment of the Court of Claims was entered April 4, 1932. (R. 23.) A petition for certiorari was filed June 21, 1932 (R. 23), and the writ was granted October 10, 1932. (R. 25.) Jurisdiction is conferred upon this Court by Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Whether, under the circumstances of this case, an administrative officer of the Army Transport Service had authority to contract on behalf of the

Government for the services of general average adjusters in preparing a statement of general average relative to cargo transported free of charge upon an army transport employed as a public vessel, part of such cargo having been destroyed in extinguishing a fire.

STATEMENT

The following is a summary of the findings of the Court of Claims (R. 12–15):

On or about December 16, 1918, fire broke out on board the U. S. Army Transport *Logan,* which was then en route from San Francisco to Manila, carrying military supplies for American troops in Siberia and the Philippine Islands, supplies belonging to the American Red Cross, supplies belonging to the Government of the Philippine Islands, and a small amount of personal property belonging to officers of the United States Army. (R. 12, 14.) All of this cargo was transported free of charge. (R. 15.) In extinguishing the fire, some of the cargo was damaged by water. (R. 13.) Some, if not all, of the cargo was covered by insurance against general average losses. (R. 13.)

By letter dated August 22, 1922, an administrative officer of the Army Transport Service of the Quartermaster Department, requested petitioner, a corporation doing business as average adjusters and insurance brokers, to prepare a statement of general average. Attached to this letter was a letter from the Acting Judge Advocate General to the Quartermaster General which referred to a

claim of the marine underwriters for contribution by the Government in general average and, after expressing the opinion that the claim was valid, recommended "that prompt steps be taken to ascertain the amount due the insurance company by way of contribution in general average," and, therefore, "that the matter be referred to a general average adjuster." (R. 13.)

Pursuant to the instructions contained in the letter of August 22, 1922, petitioner made a thorough investigation of the facts relative to the fire on the *Logan*, and on or about January 5, 1927, forwarded a general average statement to the General Superintendent of the United States Army Transport Service, at San Francisco. (R. 14.) At the same time petitioner presented a bill for its services and expenses in connection with the preparation of the statement, amounting to $2,265.12. (R. 14.) The charges made were reasonable and the disbursements included were actually incurred. (R. 14.)

On or about May 22, 1928, the Comptroller General advised the petitioner that its claim was disallowed. (R. 14.) No payment having been made, petitioner brought this suit in the Court of Claims to recover the amount thereof, with interest from December 31, 1926, the date appearing on the general average statement. (R. 6–9, 14.) The Court of Claims decided in favor of the United States. (R. 12–23.)

DISCUSSION

The court below decided the case in favor of the Government, holding that the Government is not liable to contribute in general average for damage to cargo carried free of charge on public vessels, and that none of its officers has authority to contract for the preparation of a general average statement in such a case. In its opinion the court declared that there were no guiding precedents determinative of the question whether the rules of general average apply where cargo is carried free. Upon consideration of the principles underlying the law of general average the court concluded that contribution is allowed only in cases of sacrifice made for the common good of the owners of the vessel and the owners of the cargo, who "have a common purpose and are engaged in the joint enterprise of having the cargo conveyed and landed at the point of destination." Emphasizing the importance of the fact that the owner of the vessel in such cases is paid not merely for transporting the cargo but for its care as well, and is responsible for its delivery at destination, the court concluded that there was, in the instant case, no joint adventure or enterprise with which the Government was concerned. Pointing to the fact that the Government made no contract, express or implied, with reference to conveying or safeguarding the cargo, the court said (R. 17):

> The acts of the defendant [the Government] with reference to the cargo were

> merely permissive * * *. The defendant permitted the cargo owners to place their cargo on board, but neither contracted to transport it nor to safeguard it.

Having thus determined that the Government was not liable in the case at bar to contribute in general average, the court concluded that the Government had no interest in the statement of general average, and "consequently no one could have any authority to contract" for the preparation of such a statement.

The court also held that the officer who contracted for the preparation of the general average statement had no authority to do so, even if it could be concluded that the Government was liable to contribute in general average, stating that "even if it was the duty of the Government, as owner of the vessel, to furnish a statement of general average our attention has not been called to any statutory provision, or any implication therefrom, which would authorize any person to bind the Government to pay for a statement of general average"; and that "it does not follow that even if a duty was cast upon the Government to furnish a general average statement, any official had been given authority to order one made." "The preparation of the statement for general average," the court said, "was not for the benefit of the Government, but for the benefit of those who had insured the cargo."

We believe the conclusion that the United States was not liable to the cargo underwriters for contribution in general average was correct,[1] but do not think it follows that the contract in suit was unauthorized.

The *Logan* was an army transport at the time the general average statement was ordered by "the general superintendent and administrative officer of the United States Army Transport Service." (R. 15.) The vessel was under the supervision and control of the Army Transport Service, which was a branch of the Quartermaster's Department of the Army.[2] Claim had been made by the cargo underwriters for contribution by the United States in general average. The Quartermaster General, who was in charge of the Army Transport Service, had referred this claim to the Judge Advocate General of the Army, who had advised that the claim was valid and that the matter should be referred to a general average adjuster. This information was transmitted, through official channels, to the General Superintendent, by whose authority the preparation of a general average statement was ordered. (R. 9–10.) When the

[1] The question will be presented in litigation now pending in the Court of Claims between the Government and the underwriters.

[2] See Act of June 4, 1920, c. 227, Subchapter I, sec. 9, 41 Stat. 759, 766 (U. S. C., Title 10, sec. 72), quoted in petitioner's brief, p. 18; Special Regulations No. 71, Army Transport Service, 1918, Secs. I and II, quoted in petitioner's brief, Appendix, pp. 26–27; Army Appropriation Act of June 30, 1922, c. 253, 42 Stat. 716, 730.

order was given there was no decision in any court as to the liability of the Government to contribute in general average, where the cargo damaged was carried free of charge upon a public vessel. Indeed, the court below regarded the question as one of first impression. (R. 17.)

Under these circumstances the officer would have been delinquent in the performance of his duty if in the face of what appeared to be a valid claim he had neglected to order the general average statement. Even had the Government's liability appeared doubtful, it would clearly have been the part of wisdom to preserve the basis for adjustment of the asserted liability. To have declined to do so when counsel expressed no doubt as to the existence of liability would have been sheer folly. The duty to prepare the statement, if any existed, was not upon the cargo underwriters but upon those who controlled the operation of the ship. See *Ralli* v. *Troop,* 157 U. S. 386, 400. To have deferred its preparation until ultimate liability should be determined in the courts would have incurred the risk of additional difficulty and expense in its preparation and of the loss of information necessary in its preparation.

We can not doubt that the officer charged with the entire administration of the Army Transport Service, in which the "Logan" was employed and operated, was under the circumstances of this case authorized to contract for the preparation of a general average statement. The order for this

statement was given by the General Superintendent and administrative officer of this service (R. 10, 15), who was charged with the entire administration thereof. (See statutes and Regulations cited in Footnote 2, *supra*.)

CONCLUSION

We respectfully call the attention of the Court to the fact that litigation is pending between the Government and the underwriters in which the question as to the liability of the United States to make contribution in general average will be presented upon a record disclosing all of the facts surrounding the shipment of the cargo. If our views as to the authority to make the contract in suit are correct it will not be necessary for this Court to determine that question in this case. While we are of the opinion that the conclusion of the court below that the contract in suit was unauthorized was wrong, we submit the case without formal confession of error for the decision of this Court.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
CHARLES B. RUGG,
Assistant Attorney General.
H. BRIAN HOLLAND,
W. MARVIN SMITH,
Attorneys.

DECEMBER, 1932.

U. S. GOVERNMENT PRINTING OFFICE: 1933